THIRD SESSION

Thursday, April 28, 1921, 8.30 o'clock p.m.

The Society met at 8.30 o'clock p. m., Hon. Elihu Root presiding.

President ROOT. The first exercise of the evening will be an address upon "International criminal jurisdiction," as illustrative of the work of Subcommittee No. 4, which was charged to consider the subjects not now adequately regulated by international law, but as to which the interests of international justice require that rules of law shall be declared and accepted.

This address will be made by Mr. Jesse S. Reeves, Professor of Political Science in the University of Michigan.

INTERNATIONAL CRIMINAL JURISDICTION

ADDRESS BY JESSE S. REEVES

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I

A full consideration of the topic assigned to me should include (1) criminal jurisdiction *ad hoc* sought to be erected by the peace treaties; (2) jurisdiction over war crimes committed in the future; and (3) jurisdiction over crimes of international concern in time of peace. The first leads us directly into matters essentially controversial, in which one's point of view can scarcely fail to be determined by his traditional attitude, not only toward the nature of crime and its punishment, but as to "due process of law." There is a natural reaction against *ex post facto* crimes and punishments, as well as against bills of attainder. We are apt to be under the limitations moral, if not legal, of preconceived notions of abstract justice with reference to the will and policy of the victor.

As to the second, the Paris Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties came to the conclusion that it was "desirable that for the future penal sanctions should be provided for such great outrages (as acts which brought about the war and which accompanied its inception, particularly the violation of the neutrality of Belgium and Luxemburg) against the elementary principles of international law." The American members of this commission were in substantial accord with the recommendation.

They believe that any nation going to war assumes a grave responsibility, and that a nation engaging in a war of aggression commits a

crime. They hold that the neutrality of nations should be observed, especially when it is guaranteed by a treaty to which the nations violating it are parties, and that the plighted word and good faith of nations should be observed in this as in all other respects. At the same time, given the difficulty of determining whether an act is in reality one of aggression or of defense, and given also the difficulty of framing penal sanctions, where the consequences are so great and may be so great as to be incalculable, they hesitate as to the feasibility of this conclusion, from which, however, they are unwilling to dissent.

This opinion commends itself in many ways. Those acts which are against the fundamental principles of international law are the very ones which, singly or associated with matters of morally indefensible state policy, give rise to war, or which accompany the prosecution of hostilities. Unless war is abolished (in which case there would be no effectual violation of these elementary principles, but merely attempts to do so), the ultimate decision of these matters would continue to be made by force of arms. Unfortunately, not in every war does victory side with justice. No legal structure can be erected upon such an erroneous foundation. To provide a scheme by which the victor could, in forms of law, punish his victim by alleging and proving to his own satisfaction the commission of such acts, would certainly not make for the strengthening of international law, but for its weakening. Better is it to be perfectly frank, and let the victor mete out to the victim punishments *ex post facto* as a part of conquest than to attempt to give legal form and direction to such proceedings. In the future, as in the past, the ultimate restraints upon belligerents are apt to be their own self-limitations, the fear of reprisals, and the moral reprobation of mankind. In this connection one is reminded of the long discussions upon this question which have engaged the attention of the Institute of International Law. In 1875 the Institute considered the Declaration of Brussels of the year preceding and adhered to the suggestion made by General Arnaudeau at the Conference of 1874 "in favor of an agreement among the Powers to establish similarity in the methods of restraint at present provided in their military codes, and to seek some basis for an agreement in the penalties for crimes, torts, and infractions against international law (Criminal Law of War)." The code of laws and customs of war on land proposed by the Institute in 1880 contained a provision for penal sanctions for violations of the law of war: "Article 84. Offenses against the laws of war are liable to the punishments specified in the penal law." The official commentary upon this article states, however, that "this mode of repression is only applicable when the person of the offender can be secured. In the contrary case, the criminal law is powerless, and, if the injured party deem the misdeed so serious in character as to make it necessary to recall the enemy to a respect for law, no other recourse than a resort to reprisals remains."

The idea that reprisals "recall to a respect for law" is one of those

romantic notions which the past war ought to have effectually dispelled. On the contrary, illegality countered with reprisals leads to additional illegality with new reprisals, until (if we adhere to the legality of reprisals) distinction is difficult to be drawn between the acts which are legal and those which are not. The suggestion is made in passing that "war law" falls far short of law in its very nature, a misconception based upon the idea that war is a species of litigation. Litigation is a form of conflict, but the special form of conflict known as war is certainly not litigation. Yet this idea has gripped many who have pinned their faith to the so-called codes of war-law.

Punishment of war crimes (except when the offender is lucky enough during the war or strong enough after it) is part of a generally romantic attitude toward the world, which seeks to provide a rule of action based upon the theory that the defeated party to a war is he who unjustly brought it on, and that he alone commits atrocities during it. *Securus judicat orbis terrarum*, which being translated means that "nothing succeeds like success." If the offender be the victor (the victor would never admit the offense), who would be the prosecutor? Who the judge? How would the penalties be inflicted? One may say that these fall within the range of the body of neutrals. But we have been told upon high authority that hereafter there will be no neutrals. That was, however, based upon the assumption that there will be no belligerents, because no wars; or else that hereafter no war can be limited in area, but every war will be in a sense a world war.

We are forced to take our notions of crime from that body of law which has furnished the conception of crime. Crime is a conception of comparatively late development in municipal law. Not until centralized machinery of justice has been developed within the state does crime in a legal sense exist. Acts of violence by an individual against another only gradually became public by being an offence against the king's peace, and thereafter against society organized under government in the state. One state may act toward another to excite moral reprobation, yet from a legal point of view crimes are impossible by one state against another. All authorities agree that a state as such cannot commit a crime. "An international delinquency," says Oppenheim (Vol. I, 209) "is not a crime, because the delinquent state, as a sovereign, can not be punished, although compulsion may be exercised to procure a reparation of the wrong done." In so far as the relations of state with state are legal, an act may violate a legal right or duty, but it resembles tort and not crime.

My conclusions with reference to war crimes may therefore be summarized as follows:

1. As to those charged as having been committed during the past war, policy and not law determines the matter, for the peace terms of the victor, dictated and not negotiated, are under no limitations that can be called legal. The Treaty of Versailles was a treaty actually built upon capitula-

tion, whatever the vanquished may have believed, or were led to believe. The restraints of the victor as regards the vanquished were not legal restraints. They were those of policy, and policy has regard to the vague inhibitions summed up, with no complete agreement, as justice or the principles of humanity. A treaty of peace usually carries with it amnesty, either expressed or implied. The Treaty of Versailles expressly rejects amnesty and substitutes retribution. Why seek to found a legal system upon it?

2. As to crimes committed in future wars, one is forced back upon the confession of inability made by the Institute of International Law in 1880. Punishment for violations of the code of war is predicated upon physical possession of the culprit. It can easily be had when the offender is a part of the state's forces, not of its enemy's. Such punishment is provided for by military law. Where the offender is of the enemy's forces, an altogether different situation is presented. To what extent may the doctrine of *respondeat superior* be imputed? What about ultimate culpability? Or of failure to prevent war crimes? It would seem as if all of these matters must be provided for in the treaty of peace following a war. The extent of punishment will depend upon the nature of victory and defeat,—matters ultimately determining the settlement. It is conceivable that a war limited in area might come to a different conclusion as the result of external pressure. But the settlement so made would be no less political than the former. Protection against the performance of war crimes in the future rests with the organized solidarity of the civilized world, working through the League of Nations or through some similar association or society having the same ends under a different name, so that preponderant force will always be against the aggressor. By aggressor is meant not necessarily the violator of a technical international right, but the state which resorts to war as against the organized opinion of the world. In doing so it violates in the largest sense "the peace of the world." It has no legal status. It is an outlaw.

II

The Advisory Committee of Jurists which drew up the plan for a Permanent Court of International Justice, in addition thereto prepared certain resolutions which were transmitted last fall to the Council and Assembly of the League of Nations. The second of these suggested the establishment of a High Court of International Justice, separate and distinct from the Permanent Court of International Justice in organization and jurisdiction. As to organization, the High Court was to be composed of one member for each state, to be chosen by the group of delegates from each state represented in the Court of Arbitration.

> Article 3. The High Court of Justice shall be competent to try crimes against international public order and the universal law of

> nations, which shall be referred to it by the Assembly or by the Council of the League of Nations.
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> Article 4. The Court shall have power to define the nature of the crime, to fix the penalty, and to prescribe the appropriate means of carrying out the judgment. It shall formulate its own rules of procedure. .

The Council of the League, in submitting the "recommendation" of the committee to the Assembly, suggested that the plan be placed for consideration before certain bodies of specialists in international law, the American Institute of International Law among the number.

> These associations would then have to give preliminary replies to the two questions as to whether a High Court of Justice should be established with the objects, the jurisdiction and the organization laid down in the draft contained in the second recommendation, and, if so, whether this should be a special court, or if jurisdiction in criminal matters should be entrusted to the Permanent Court of International Justice provided for in Article 14 of the Covenant. The preliminary replies of the international associations should then be submitted by the Council to the governments of the states members of the League of Nations.

This resolution was referred by the Assembly to a committee (No. 3), which declined to adopt the "recommendation."

The plan of the Permanent Court of International Justice contains no provision for criminal jurisdiction, and the supplementary proposition for a special court having been "dished," the present organization of the world provides for no such judicial machinery further than that provided under the Treaty of Versailles for the trial of war crimes. Nevertheless, the matter of an international penal jurisdiction comes before us "as a matter not now adequately regulated by international law, but as to which the interests of international justice require that rules of law shall be declared and accepted."

Not forgetful of the eminent learning and skill of those who composed the Hague Committee on the plan for a Permanent Court of Justice, and paying tribute to them for the execution of an extremely difficult task in drafting the plan, one cannot refrain from expressing surprise at the extraordinary range of power with which it was proposed to clothe the High Court of International Justice. In the first place, it was to be competent to try "crimes against international public order, which shall be referred to it by the Assembly or by the Council of the League of Nations." This might and probably did mean simply that the League might turn over to this special court for trial all or a portion of those charged with war crimes under the treaties of peace, and that when this function was performed, the High Court would become *functus officio*. Otherwise, if it were to be a permanent criminal court, it could act only after the Council or Assembly had decided

that a case should be brought to trial by the court. Thus the Council and the Assembly or its agencies would function as an inquisition, or *juge d'instruction*, or as a district attorney's office to prepare information. Such an idea is absurd, and one is thrown back upon the previous suggestion that it was intended to be a special court for the trial of crimes already committed under Article 228 of the Treaty of Versailles. The treaties with Austria (Article 173) and with Hungary (Article 157) provide for the trial of war crimes before military tribunals only. What are crimes "against international public order and the universal law of nations?" This is a question not yet answered, but which the proposed court would have power to answer: "The court shall have power to define the nature of the crime (*un pouvoir appréciateur pour caracteriser le delit*), fix the penalty, and prescribe the appropriate means of carrying out the judgment." The world is under obligation to Committee No. 3 of the Assembly of the League of Nations for its successful opposition to a plan which would have created a travesty upon a court. Again, it is better to proceed frankly under the supposed right of the victor against the conquered to punish according to the will of the victor, than to disguise such acts under the name of a judicial proceeding, where a court defines the crime and prescribes appropriate penalties.

III

Let us pass from these matters of past war crimes to questions of international law that are not so closely associated with the peace settlement and the execution of the will of the victor. The proposed Permanent Court of Justice provides no jurisdiction, criminal or quasi-criminal. Eliminating the possibility of criminal jurisdiction over states, because states are not capable of committing crimes in any legal sense, there remains a very proper basis for jurisdiction over controversies between states arising *ex delicto*, where the basis of the controversy is an act alleged to be criminal performed by a person (natural or artificial) which may give rise to diplomatic reclamation. International criminal law is based upon conflict of laws. It is in this sense that it has long been used and with reference to which there is a large and well considered literature. The names of Kohler, Meili, Niemeyer, Travers, and Adenalfi, at once suggest themselves. It is not private international law, because criminal law is public law, the administration of criminal justice having come to be a state act purely. Therefore international penal law is a conflict of public laws of municipal or state jurisdictions. The controversy over the conflict of criminal laws is one of pure international law; it is a matter involving the reciprocal acts and obligations of state and state. It would seem, therefore, that such controversies are not only justiciable but within the proper jurisdiction of the proposed Permanent Court of International Justice. As modified by the League of Nations Assembly, the jurisdiction of the court is to "comprise all cases which the parties refer

to it and all matters specially provided for in the treaties or conventions in force" (Article 36).

The only international crime existing by the customary law of nations is that of piracy; but the term as used means international only in the sense that it is universally recognized and that its punishment rests with no one state. A pirate being denationalized, all states have concurrent jurisdiction over him as an outlaw. Yet even this offense might give rise to diplomatic reclamation. Suppose state A interposes in behalf of X, her alleged national captured by state B and charged with piracy. A simple situation such as this might fall within the jurisdiction of the court in a quasi-penal controversy. It is easy to imagine a case similar to that of Ambrose Light, for instance, falling within the competence of the court. Other offences called international have been made so wholly by treaty. Examples readily occurring have to do with the African slave trade, the white slave traffic, and liquor traffic in the North Sea. In each of these the signatories, following treaty agreement, have put certain acts under the ban of municipal criminal law. In addition, such treaties have usually provided concurrent jurisdiction over the offender, whatever his nationality. There may well be additional international agreements extending the list of offenses against society in its larger sense.

The problem of international penal jurisdiction is to combine conventional agreement upon two fundamentally different subjects. The first, as suggested, is to proceed along the lines of the white slave traffic convention so as to provide a list of offenses of international significance and concern, basing jurisdiction wholly upon the place of arrest and custody, thereby eliminating the troublesome factors of *locus* of the crime and the nationality of the offender. It is not likely that the list of such international crimes would become large. Each type of offense would have to be so universally reprobated that the culprit would be considered as an offender against the human race.

The second problem has to do with the divergencies of conflicting municipal penal systems. Because of the radical variation among states as to territorial and non-territorial crimes, it is too much to expect that any state will completely abandon its system or materially modify it with a view to international uniformity. There are, however, areas of conflict within which agreement might seem to be possible. There is, for example, the conflict of territorial and quasi-territorial jurisdiction involved in the matter of offenses committed upon merchant vessels in foreign ports and waters. When, where, and how shall the jurisdiction of the ship's state end, and that of the port's state begin? What are the offenses that disturb the peace and security of the port? With reference to these matters it would seem that an agreement ought to be possible which, without derogating from the authority of either state to any degree, would provide a uniform rule of action. A not dissimilar situation arises as to aircraft. Here

the recent international agreement seems to point the way, at least, to uniformity.

The question of extraterritorial crime,—to what extent should a state assume jurisdiction over offenses committed by aliens abroad—is one which has not yet been solved. The practices growing out of the municipal law vary widely from state to state. There might well be some common factor of uniformity which would furnish a rule of action for states. There are, furthermore, questions associated with extradition, with asylum, with the nature of political offenses, with the international effects of penal sanctions. To rehearse these would be to review the field of international criminal law. What is needed is a series of international agreements, so that the Permanent Court might have a standard of rights and duties of states with reference to their respective penal jurisdictions. Even more important than this, agreements of this kind would eliminate many international differences, and finally they would assist in the development of an important function—that of an international penal administration.

President ROOT. With reference to the action of the Hague Committee of Jurists regarding the International Court of Justice, I would like to state that the committee did not recommend it. The project was submitted to the committee, and, I think, the last day of the session, or the day before, it was brought up by the president, Baron Descamps, of Belgium, but the committee did not consider it or discuss it. They referred it to the Council for consideration without any action on the part of the committee. I doubt if there would have been a single vote in the committee except that of the author of the project in its favor, and I think the committee generally agreed with Professor Reeves' view.

Professor REEVES. I used the word "recommendation" as a quotation; the record used that word in referring to the transmission of the document, which at the time I thought was erroneous, because there was no record that the committee actually adopted it.

President ROOT. There may have been, but the committee scrupulously refrained from any recommendation of that scheme.

The next in the order of exercises is the address on "The status of international cables in war and peace" which will be delivered by Mr. Elihu Root, Jr., a member of the New York Bar.